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No. 91-1844

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

WAYNE SNOW, JR., Chairman, Georgia State Board of Pardons and Paroles,

Petitioner,

v.

ISAAC GRAHAM,

Respondent.

Petition For Writ Of Certiorari To The United States Court of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) The Eleventh Circuit erred in relying on *Akins v. Snow*, 922 F.2d 1558 (11th Cir. 1991) which applies the "substantial disadvantage" standard for testing whether a regulation violates the ex post facto clause when this standard was expressly overruled by the Supreme Court in *Collins v. Youngblood*, 497 U.S. ___, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990).

(2) A parole regulation changing the time for an inmate's parole reconsideration hearing is not a "law" subject to the ex post facto provision of the U.S. Constitution.

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In The

Supreme Court of the United States

October Term, 1991

WAYNE SNOW, JR., Chairman, Georgia State Board of Pardons and Paroles,

Petitioner,

v.

ISAAC GRAHAM,

Respondent.

Petition For Writ Of Certiorari To The United States Court of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, Wayne Snow, Jr., Chairman of the Georgia Board of Pardons and Paroles, respectfully prays the Writ of Certiorari issue to review the judgment of the Eleventh Circuit Court of Appeals entered on April 2, 1992.

OPINIONS BELOW

The original panel decision of the Eleventh Circuit Court of Appeals was reported in *Graham v. Snow,* No. 90-8660 (11th Cir. 1992). A copy of that opinion is included as Appendix A. The Petition for Rehearing and

Suggestion of Rehearing En Banc was denied on April 2, 1992 and is included as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on April 2, 1992. This Petition for Writ of Certiorari has been filed within the allowable ninety days from that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

U.S. Const., Art. I, Sec. X, Cl. I.

"No State shall . . . pass any . . . ex post facto law. . . . "

STATEMENT OF THE CASE

Plaintiff commenced this action on November 6, 1989, by filing a complaint pro se in the United States District Court for the Southern District of Georgia. Among other things, Plaintiff averred that the application to him of revised rules regarding the time for reconsideration for parole constituted an ex post facto law. The action was transferred to the United States District Court for the Northern District of Georgia and Defendants were duly served.

On February 9, 1990, Defendants moved under Fed. R. Civ. P. 12 to dismiss the complaint. In an order entered

June 25, 1990, the action was dismissed. However, this order preceded the recent Eleventh Circuit decision of *Akins v. Snow*, 922 F.2d 1558 (11th Cir. 1991).

Plaintiff appealed the dismissal of this action. By Order of the United States Court of Appeals of the Eleventh Circuit, Plaintiff was appointed counsel. This matter was briefed and orally argued before the Eleventh Circuit. In the interim between the dismissal of the suit in the district court and briefs in the Eleventh Circuit, the case of *Akins v. Snow* was decided. *Adkins* was binding on the Eleventh Circuit panel and is indistinguishable from the present case. Based on *Akins*, the panel reversed the decision of the district court below dismissing Plaintiff's case. The panel appropriately affirmed the decision dismissing Plaintiff's claims for damages. The Defendants petitioned for rehearing en banc on February 28, 1992. The Petition for Rehearing and Suggestion of Rehearing En Banc was denied on April 2, 1992.

REASONS FOR GRANTING THE WRIT

A. THE ELEVENTH CIRCUIT ERRED IN RELYING UPON *AKINS V. SNOW*, 922 F.2d 1558 (11th Cir. 1991), WHICH APPLIES THE "SUBSTANTIAL DISADVANTAGE" STANDARD FOR TESTING WHETHER A REGULATION VIOLATES THE EX POST FACTO CLAUSE SINCE THIS STANDARD WAS EXPRESSLY OVERRULED BY THE SUPREME COURT IN *COLLINS V. YOUNGBLOOD*, 497 U.S. ___, 110 S.CT. 2715, 111 L.Ed.2d 30 (1990).

Defendants urged the court below that *Akins v. Snow*, 922 F.2d 1558 (11th Cir. 1991) was wrongly decided. The

Akins court did not consider the recent decision of the Supreme Court in *Collins v. Youngblood, supra*. In light of this Supreme Court decision, *Akins* is clearly wrongly decided. In *Collins*, this Court explained that the ex post facto provision had been expanded by various district courts beyond the realms required in the Constitution. In an effort to limit the restrictions of the ex post facto clause, the Court defined the parameters of the definition of an ex post facto law. In order to come within the provisions of the ex post facto clause, a change in a law must: (1) punish as a crime an act previously committed which was innocent when done; (2) make more burdensome the punishment for a crime, after its commission; or (3) deprive one charged with a crime of any defense previously available at the time the act was committed. *Id.* at ___, 110 S.Ct. at 2719.

This Court expressly overruled prior cases which had expanded the ex post facto clause to include laws which deprive a defendant of a "substantial protection" under the law. *Id.* at ___, 110 S.Ct. at 2721-22. The standard overruled in *Collins* is the exact standard applied in the *Akins* decision by the Eleventh Circuit and again in the present case. The *Akins* panel found that a law increases a criminal defendant's punishment if it "disadvantage[s] the offender affected by it." The court held that the Board's change in the time for reconsideration for parole increases his punishment by substantially disadvantaging his opportunity for parole. The same holding was made in the present case in light of *Akins*. However, in *Collins*, this Court held that a law does not increase punishment simply by "substantially disadvantaging" the criminal

defendant. *Id.* The law must, in fact, be an increase in punishment or sentence. *Id.*

Respondent Graham, like the inmate in *Akins*, has not had an increase in punishment by a set-off in the time period between reconsiderations. Parole has always been a matter of complete discretion with the Parole Board. *Slocum v. Georgia State Board of Pardons and Paroles*, 678 F.2d 940 (11th Cir. 1982). This Court has never held that parole eligibility is a part of the prisoner's sentence subject to the prohibitions of the ex post facto clause. *Collins, supra.* In *Greenholtz v. Inmates of Nebraska*, 441 U.S. 1316, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979), it was held that in a state where parole rests in the discretion of the parole board, an inmate has no due process entitlement. A reasonable entitlement to due process is not created merely because a state provides for the possibility of parole. Such a possibility provides no more than a mere hope that the benefit will be obtained. *Id.* Plaintiff's hope in the possibility of parole following his conviction has not changed. The Parole Board has not increased his punishment by changing the time before he will be automatically reconsidered. Even assuming Plaintiff was "substantially disadvantaged," which he is not, this does not increase his punishment, or subject the change in the Parole Board rules to the provisions of the ex post facto clause. *Collins, supra.*

Also, the present case cannot be distinguished from the holdings in the Eleventh Circuit decision in *Damiano v. Florida Parole and Probation Commission*, 785 F.2d 929 (11th Cir. 1986) and this Court's decision of *Greenholtz*. In *Damiano*, an inmate argued that the retroactive use of parole guidelines which extended his tentative parole

release date violated the ex post facto clause. There, the court reasoned that because the matter of parole had always been in the complete discretion of the parole board, an extension of a parole date did not violate the ex post facto clause.

In summary, *Akins* and the present case should be overruled in order to align this case with the precedent of the United States Supreme Court. The Eleventh Circuit should not have applied the substantial disadvantage test but should have considered whether punishment was increased as a result of the change in the Board's regulation. Because parole has always been a matter within the complete discretion of the Parole Board, and there has never been more than a hope for parole, an inmate is not punished by the Board's refusal to reconsider him sooner. *See also Slocum v. Georgia State Board of Pardons & Paroles*, 678 F.2d 940 (11th Cir. 1982) (a prisoner does not have a protectable expectation of conditional release which would entitle him to due process in his consideration for parole and the decision whether to release an inmate on parole is a matter committed to the discretion of the Parole Board).

B. A PAROLE REGULATION EXTENDING THE TIME FOR AN INMATE'S PAROLE RECONSIDERATION REVIEW IS NOT A "LAW" SUBJECT TO THE EX POST FACTO PROVISIONS OF THE UNITED STATES CONSTITUTION.

The *Akins* panel, prior to determining whether the change in the regulation amounted to an increase of punishment first questioned whether the ex post facto

clause should apply to a change in the Parole Board regulations. The *Akins* holding that a change in the Parole Board regulations is a law subject to the ex post facto clause is contrary to the majority of decisions in other circuits. *See, Bailey v. Gardebring*, 940 F.2d 1150 (8th Cir. 1991).[1] In *Bailey*, the court considered whether a change in the parole board regulations of Minnesota amounted to a loss subject to the ex post facto clause. The parole board, like the Georgia Parole Board, was vested with complete discretionary authority to grant or deny parole by the state legislature. In addition, the legislature commanded that the Parole Board issue specific regulations governing the procedures by which parole would be granted. The Court held that internal regulations governing the exercise of the power to grant or deny parole were not laws within the meaning of the ex post facto clause. Citing numerous authorities, the Court found that a majority of circuit courts agreed with this conclusion. It noted that *Akins* was an exception to this rule. *Id.*, 940

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[1] In *Bailey v. Gardebring*, 940 F.2d 1150 (8th Cir. 1991), the court recognized that the majority of courts agreed a state paroling authority's regulations are not subject to the ex post facto prohibition. *See Resnick v. United States Parole Commission*, 835 F.2d 1297, 1301 (10th Cir. 1987); *Vermouth v. Corrothers*, 827 F.2d 599, 604 (9th Cir. 1987); *Sheary v. United States Parole Commission*, 822 F.2d 556, 558 (5th Cir. 1987); *Prater v. United States Parole Commission*, 802 F.2d 948, 952-54 (7th Cir. 1986); *DiNapoli v. Northeast Regional Parole Commission*, 764 F.2d 143, 146-47 (2nd Cir.), *cert. denied*, 474 U.S. 1020, 106 S.Ct. 568, 88 L.Ed.2d 553 (1985); *Warren v. United State Parole Commission*, 659 F.2d 183, 193-97 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 950, 102 S.Ct. 1454, 71 L.Ed.2d 665 (1982); and *Ruip v. United States*, 555 F.2d 1331, 1335-36 (6th Cir. 1977).

F.2d at 1157. The court in *Bailey* found that because parole regulations were not laws for ex post facto purposes, summary judgment was appropriate on the ex post facto claim.

The "law" in effect at the time of Respondent's illegal acts was that the parole board was free to parole any inmate. The parole "law" in effect now is still the same. The regulations issued within the realm of exercising that discretionary power should not be viewed as laws for purposes of the ex post facto clause. *See also Francis v. Fox*, 838 F.2d 1147 (11th Cir. 1988) (a state work release regulation issued pursuant to a statutory grant of discretionary power to the Department of Corrections is not an ex post facto "law").

It is clear in *Akins* and the present case, Plaintiff has not lost the possibility of being paroled merely because the set-off date for reconsideration review has been increased. An informal review of a case can be conducted at any time when exceptional circumstances are brought before the Board. A change in the reconsideration date does not limit the discretionary power to grant or deny parole by the Board. The Board merely made an administrative decision that parole reconsideration reviews need not be conducted as frequently. The Parole Board in exercising its discretion, determined that life sentenced inmates were not regularly going to be given parole until after they had served at least 15 years of their sentence.

CONCLUSION

For the above and foregoing reasons, Petitioner prays that this Court grant a Writ of Certiorari to review the decisions of the Eleventh Circuit Court of Appeals as the Eleventh Circuit Court of Appeals ignored the precedent of this Court and ruled erroneously.

Respectfully submitted,

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APPENDIX A

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-8660

D.C. Docket No. 1:89-CV-2569-JTC

ISAAC GRAHAM,

Plaintiff-Appellant,

versus

WAYNE SNOW, JR., JAMES T. MORRIS, MOBLEY HOWELL, MICHAEL H. WING, and BETTY O. HUTCHINSON, Members of the State Board of Pardons and Paroles,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(February 7, 1992)

Before KRAVITCH and BIRCH, Circuit Judges, and Kaufman*, Senior District Judge.

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*Honorable Frank A. Kaufman, Senior U. S. District Judge for the District of Maryland, sitting by designation.

PER CURIAM:

Isaac Graham filed a claim under 42 U.S.C. § 1983 against the members of the Georgia State Board of Pardons and Paroles ("Board"), in both their official and individual capacities, for violation of the Ex Post Facto Clause of the United States Constitution, seeking injunctive relief and monetary damages. The district court dismissed the suit for failure to state a claim upon which relief may be granted. We reverse.

I. FACTS

Graham, an inmate in the Georgia state prison system, was convicted of murder and sentenced to life imprisonment in 1970. At that time, the Georgia State Board of Pardons and Paroles Rule ("Rule") 475-3-.06 provided that a person serving a life sentence would be eligible for parole consideration after seven years. Rule 475-3-.05(2) provided that if parole were denied, the prisoner would be eligible for reconsideration annually. A 1985 amendment to Rule 475-3-.05(2) extended the time for reconsideration to every eight years.

In his complaint, Graham asserts that he was denied parole in 1984 and informed that he would be reconsidered in eight years. Graham argues that he should be considered for parole according to the laws in effect at the time of his sentence, which provided for reconsideration annually, and that application of the new rule violates the Ex Post Facto Clause, U.S. Constitution, Article I, § 10, Cl. 1.

II. DISCUSSION

The Supreme Court has held that a law violates the Ex Post Facto Clause if it (1) is retrospective, in the sense that it applies to events occurring before its enactment, and (2) disadvantages the offender affected by it. *Weaver v. Graham*, 450 U.S. 24, 29 (1981). The district court dismissed Graham's complaint, holding that

> the Georgia parole scheme has been at all times and remains a matter of discretion with the State Board of Pardons and Paroles. Thus, the new statutory parole guidelines do not subject plaintiff to more onerous treatment. Accordingly, any modification in the method to determine plaintiff's parole eligibility does not violate the ex post facto clause.

District Court Order, at 2.

Subsequent to the district court's ruling, however, this court decided *Akins v. Snow*, 922 F.2d 1558 (11th Cir. 1991) and expressly rejected the rationale that underlay the district court's opinion in this case. This court reasoned that because the Georgia legislature delegated to the Board the power to enact rules and regulations concerning parole reconsideration that have the force and effect of law, the Board's rules or regulations are subject to the *ex post facto* prohibition. *Akins*, 922 F.2d at 1561. In applying the Supreme Court's *Weaver* analysis, the *Akins* court held that the amendments to the rules regarding parole eligibility were retrospective because they altered the consequences of their crimes after they were complete and that they disadvantaged the prisoner by reducing his opportunity for parole. *Id.* Thus, retroactive application

of a rule that changed the period between parole reconsideration hearings amounted to a violation of the Ex Post Facto Clause. The State conceded in a supplemental brief and at oral argument that *Akins* controls this case. As in *Akins*, Graham is entitled to annual parole reconsideration as provided for by the Board rules in effect when he was sentenced.

Graham's claim for monetary damages, however, must be dismissed. Graham's action for damages against members of the Board in their official capacity is barred by Eleventh Amendment sovereign immunity. *Monell v. Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018 (1978). Board members are also protected individually by qualified, or "good faith" immunity because, prior to *Akins*, the law was not clearly established that retroactive application of Board rules was a violation of the Ex Post Facto Clause. *See Harlow v. Fitzgerald*, 457 U.S. 800, 1092 S.Ct. 2727 (1982); *Rich v. Dollar*, 841 F.2d 1558 (11th Cir. 1988).

III. CONCLUSION

We REVERSE the district court's dismissal for failure to state a claim upon which relief may be granted and REMAND the case for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

APPENDIX B

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-8660

ISAAC GRAHAM,

Plaintiff-Appellant,

versus

WAYNE SNOW, JR., JAMES T. MORRIS, MOBLEY HOWELL, MICHAEL H. WING, and BETTY O. HUTCHINSON, Members of the State Board of Pardons and Paroles,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Georgia

(Filed Apr. 2, 1992)

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion February 7, 1992, 11th Cir., 19___, _____F.2d_____).

Before: KRAVITCH and BIRCH, Circuit Judges, and KAUFMAN*, Senior District Judge.

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*Hon. Frank A. Kaufman, Senior U.S. District Judge for the District of Maryland, sitting by designation.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Phyllis Kravitch
UNITED STATES CIRCUIT JUDGE